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The Hon. Thomas O. Rice

8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF WASHINGTON

10 ERIN FRANKLIN, as an individual
11 plaintiff, and the ESTATE OF JOHN
12 FRANKLIN, by and through Personal
13 Representative Erin Franklin; BROCK
14 FRANKLIN; BLAKE FRANKLIN;
15 and AVERY FRANKLIN,

Plaintiffs,

16 v.

17 INTER-CON SECURITY
18 SYSTEMS, INC, and its Parent
19 Company TBD, and by and through
20 others TBD,

Defendants.

Case No. 2:23-cv-00338-TOR
Spokane County Superior Court
23-2-04486-32

PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
REMAND

Hearing Date: January 22, 2024
Without Oral Argument

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1 Plaintiffs reply in support of their motion for remand (ECF 6) as follows:

2 1. Complete Diversity Does Not Exist.

3 Defendant Inter-Con parent company acknowledges that the Defendant
 4 security guard is a Washington resident, i.e., “the alleged perpetrator was indeed
 5 a local employee.” ECF 7, p. 9:8-9. An acting forum employee defeats diversity
 6 jurisdiction. *Padilla v. AT & T Corp.*, 697 F. Supp. 2d 1156, 1158 (C.D. Cal.
 7 2009) (forum manager and primary actor named as a defendant defeats diversity
 8 jurisdiction). The court may not ignore a resident defendant whose presence
 9 would defeat diversity. *Christison v. Biogen Idec, Inc.*, 2011 WL 13153242, at
 10 *2 (N.D. Cal. Nov. 14, 2011) (“status of defendants as served or unserved is
 11 irrelevant to the existence of original diversity jurisdiction under 28 U.S.C. §
 12 1332,” and if the plaintiff is a forum resident, the presence of a local defendant
 13 (served or unserved) will preclude removal). Management employees need not
 14 be in the forum to defeat diversity jurisdiction. *Goddard v. Jubilant*
 15 *Hollisterstier, LLC*, 2023 WL 3020494, at *2 (E.D. Wash. Apr. 20, 2023)
 16 (finding that the defendant parent failed to meet its burden of proof). Complete
 17 diversity fails.

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Inter-Con's parent also offers no more than conclusory allegations regarding their local entity— “Defendant is definitely not a ‘local forum business entity.’” ECF 7, p. 7:2 (emphasis in original). This is not sufficient. Plaintiffs have evidenced the various “Inter-Con” operations throughout Washington, with discovery intended. ECF 5, paras. 7-14, 16. Defendant’s conclusory evidence does not even establish whether Defendant's principal place of business is diverse from Plaintiffs' Washington citizenship. Complete diversity is not established.

2. Federal question jurisdiction is waived.

Defendant impermissibly raises federal enclave jurisdiction in their response to a remand motion. "Federal enclave jurisdiction is ...part of a court's federal question jurisdiction under 28 U.S.C. § 1331." *Blahnik v. BASF Corp.*, No. C.A. C-06-410, 2006 WL 2850113, at *3 (S.D. Tex. Oct. 3, 2006). A defendant must, therefore, state federal question jurisdiction as a basis for removal in its petition for removal, the latter of which must be filed within thirty days of receiving the complaint. 28 U.S.C. § 1446(b). Defendant Inter-Con failed to raise federal question jurisdiction in its removal notice, and cannot raise that basis for removal now. Defendant was served on October 26, 2023. ECF 1,

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1 p. 2:12, and see para 5. Defendant filed its removal petition on November 17,
 2 2023, citing diversity as a basis for this Court's subject matter jurisdiction. ECF
 3 1, ECF 2. Defendant has never amended its notice. A removal petition cannot be
 4 amended in any event to add a separate basis for removal jurisdiction after the
 5 thirty day period. *O'Halloran v. Univ. of Washington*, 856 F.2d 1375, 1381 (9th
 6 Cir. 1988); and see *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl.*
 7 *Quality*, 213 F.3d 1108, 1117 (9th Cir. 2000); *City of Oakland v. BP PLC*, 969
 8 F.3d 895, 891 (9th Cir. 2020) ("Because the deadline for amending the notices
 9 of removal has passed, the Energy Companies may not rely on admiralty
 10 jurisdiction as a basis for removal on remand."). Moreover, Defendant may
 11 certainly not raise a new basis for federal jurisdiction by response to a remand
 12 motion. See, e.g., *Lydig Const., Inc. v. Carpenters Health and Security Trust of*
 13 *Western Wash.*, 2008 WL 901679, at *1 (W.D. Wash. Mar. 28, 2008) ("The
 14 additional bases for jurisdiction asserted in [the] . . . opposition [to the motion
 15 to remand] . . . do not support removal, as neither basis was stated in the Notice
 16 of Removal as required by 28 U.S.C. § 1446(a)."). Newly asserted "defenses" to
 17 state claims also do not create jurisdiction. *Id.*, ref. *Franchise Tax Bd. of State*
 18 *of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 16 (1983);

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1 *Sullivan v. BNSF Ry. Co.*, 447 F.Supp.2d 1092, 1099-1100 (D. Ariz. 2006)
 2 (refusing to consider the defendant's alternative ground for removal based on §
 3 1442(a)(1), because it was raised for the first time in response to the plaintiff's
 4 motion to remand). Where a defendant raises new grounds for federal
 5 jurisdiction in its opposition to a motion to remand that were not raised in its
 6 removal papers, the court should not consider those grounds, which are waived.
 7
 8 *Delaney v. Casapro, Inc.*, 2013 WL 3328686, *3 & n.4 (D.S.C. July 2, 2013)
 9 (referencing *Sullivan* *supra*). Defendant's Inter-Con parent company waived
 10 federal question jurisdiction.
 11
 12

13 3. Defendant has not evidenced federal enclave jurisdiction.

14 Even were the court to impermissibly consider a new basis for removal,
 15 Defendant has not remotely shown facts establishing federal enclave jurisdiction.
 16
 17 If anything, it has shown the opposite.

18 First, Plaintiff's Complaint places the material events on public spaces.
 19 The events causing injury and death occurred "near" the East Hawthorne Road
 20 address, *not on it*. ECF 1-2, para. 1.17. Defendant's employee was explicitly
 21 "outside his jurisdiction" on a *public* road when he began pursuing Plaintiffs. *Id.*,
 22 para. 3.23. Inter-Con's guard drove to Plaintiffs on a public roadway where
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1 Plaintiffs were on a “small publicly accessible gravel pull-out on the north side
2 of East Hawthorne Road.” *Id.*, para. 3.12; also see 3.13 (area “fully accessible to
3 the public traveling on the road, available for people to make U-turns, etc.”), *and*
4 *see* para. 3.17. A “newly installed” Bonneville Power Administration sign was
5 in the gravel pull-out, but what parts of that pull-out are owned by a federal
6 entity, if any, is not in evidence. The shooting event occurred on another publicly
7 accessible gravel area adjacent to the same public road, on a “BPA parking lot.”
8 *Id.*, paras. 3.31, 3.34, 3.35. The guard’s unlawful pursuit on public roads outside
9 his jurisdiction is what forced Plaintiffs onto “BPA property.” *Id.*, paras. 3.34,
10 3.35. Spokane County law enforcement investigated the incident. ECF 5, paras.
11 3 and 4. Spokane County’s medical examiner addressed the injury and death. *Id.*,
12 para. 3.79. The Defendant parent company is also charged with negligent
13 management of its employees, which did not take place in that gravel access area.
14 Most likely, training would occur over a private company intranet server, the
15 location of which remains unknown. No federal entity has asserted jurisdiction
16 over the criminal investigation or moved to intervene. Moreover, injuries are
17 caused to Plaintiffs who were nowhere near federal property—Erin, Blake, and
18 Avery Franklin.

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1 Second, Defendant submits a *Spokane County* property record showing
 2 that the U.S. Department of Energy pays Spokane County taxes under a county
 3 tax code area of “1280.” ECF 8-2, p. 1/3. Federal enclaves are immune from
 4 state taxation, and the status “debar[s] the State from exercising any legislative
 5 authority, including its taxing and police power, in relation to the property and
 6 activities of individuals and corporations within the territory.” *Swords to*
 7 *Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005), *ref. Silas*
 8 *Mason Co. v. Tax Comm'n of Wash.*, 302 U.S. 186, 197 (1937). Moreover,
 9 private contractors on certain federal operations, such as Defendant Inter-Con
 10 here, are subject to Washington law, and taxed under Washington employment
 11 laws. *Ryan v. State*, 188 Wash. 115, 134, 61 P.2d 1276, 1284 (1936), *aff'd sub*
 12 *nom. Silas Mason Co.*, *supra*. Defendant’s property tax evidence thus undercuts
 13 its assertion that these gravel areas are a federal enclave.
 14

15 Third, federal enclave jurisdiction is applied “narrowly,” and it does not
 16 apply where the federal land is incidental to the tortious conduct. “[A] defendant
 17 cannot use activities on federal enclaves to create instant jurisdiction for a state-
 18 law claim.” *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1111 (9th
 19 Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023). This case also “involves private
 20

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1 parties to a private contract that coincidentally had some nexus to federal
 2 property." *See Handyman Network, Inc. v. Westinghouse Savannah River Co.,*
 3 *Inc.*, 868 F. Supp. 151, 154-55 (D. S.C. 1994) ("Congress did not intend to
 4 extend federal jurisdiction to such contracts."). Specifically, Defendant's private
 5 security guard recklessly chased Spokane County residents down a public road
 6 onto a gravel parking lot "near" the DOE by reckless driving. Plaintiffs were
 7 voluntarily in that parking lot only to prevent a car accident. ECF 1-2, para. 3.34.
 8 Moreover, only state claims are pled. The *Handyman Network, Inc.* court notes
 9 that, as here, "Plaintiff's right to relief does not necessarily depend on the
 10 resolution of a substantial question of federal law. " *Id.*, at 154. State law applies
 11 to the tort claims pled, because "[T]he law on a federal enclave is the state law
 12 that governed the land at the time the federal government established the enclave,
 13 not state law enacted thereafter—unless that law was expressly adopted by the
 14 enclave's new sovereign, the federal government." *Allison*, 689 F.3d at 1235.
 15 Plaintiffs' causes of action were established by the common law, which became
 16 the law of the state in the year 1862. RCW 4.04.010. Wrongful death actions
 17 were established in 1917. RCW § 4.20.020. The federal land, if any, is incidental
 18 to the events and the claims, and is not properly applied.
 19

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1 Fourth, federal ownership and use the public pull-out and parking areas
 2 “without more (does) not withdraw the lands from the jurisdiction of the state.”
 3
 4 *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930). For the United States
 5 to obtain exclusive legislative jurisdiction over a parcel of land, proof of three
 6 elements are necessary: 1) purchase of the land by the Government; 2) cession
 7 by the State; and 3) acceptance of exclusive jurisdiction by Congress. *See*
 8
 9 *Defenders of Wildlife v. Everson*, 984 F.3d 918, 925 (10th Cir. 2020) (“The
 10 federal government may obtain jurisdiction over property through a state's
 11 cession of legislative jurisdiction, coupled with acceptance of the cession by the
 12 United States.”); *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235
 13 (10th Cir. 2012) (“A federal enclave is created when a state cedes jurisdiction
 14 over land within its borders to the federal government and Congress accepts that
 15 cession.”). The mere fact that the Government holds title to property within the
 16 boundaries of a state does not “necessitate the assumption by the Government
 17 of the burdens incident to an exclusive jurisdiction.” *Atkinson v. State Tax*
 18
 19 *Commission of Oregon*, 303 U.S. 20, 23 (1938). A grant of jurisdiction by a
 20 State to the Federal Government “need not be accepted.” *Humble Pipe Line Co.*
 21
 22 *v. Waggonner*, 376 U.S. 369, 373 (1964). Here, Plaintiffs evidence that the State

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1 of Washington's Spokane County law enforcement handled the investigation of
 2 this incident on the publicly accessible gravel area involved, ECF 5, para 3, and
 3 Defendant's County taxation document supports the County's providing law
 4 enforcement services to that area. ECF 8-2. Moreover, unless Washington State
 5 has agreed to the exercise of federal jurisdiction over the parking area in question,
 6 the United States would hold "only the rights of an ordinary proprietor. " *Ft.*
 7 *Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 527 (1885). Where the Federal
 8 Government does not assert exclusive jurisdiction (over public lands), "the State
 9 is free to enforce its criminal and civil laws on those lands. " *Kleppe v. New*
 10 *Mexico*, 426 U.S. 529, 543 (1976); *see also Mendoza v. Neudorfer Engineers,*
 11 *Inc.*, 145 Wn. App. 146, 152 (2008), ref., e.g., *Gulf Offshore Co. v. Mobil Oil*
 12 *Corp.*, 453 U.S. 473, 481 (1981) (holding that "[n]othing inherent in exclusive
 13 federal sovereignty over a territory precludes a state court from entertaining a
 14 personal injury suit concerning events occurring in the territory and governed by
 15 federal law.").

22 In sum, Defendant presents no evidence satisfying the complex questions
 23 necessary for this Court to conclude that these publicly accessible gravel areas
 24 are a federal enclave. *See Scott v. Does 1 through 100*, 2012 WL 13013026, at
 25

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1 *2 (C.D. Cal. Oct. 25, 2012), quoting *Celli v. Shoell*, 40 F.3d 324, 328 (10th Cir.
2 1994). Plaintiffs' motion to remand should be granted.
3

4 DATED this 5th day of January, 2024.
5

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7

8 /s/Mary Schultz
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 5th day of January, 2024, she filed and served the foregoing document to all counsel and parties using the Eastern District of Washington U.S. District Court CM/ECF system, which will automatically serve notice to all attorneys who have appeared in this action and registered with the electronic filing system. Plaintiffs are not aware of any non-CM/ECF participants.

Dated this 5th day of January, 2024.

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